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BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Denial of a Request for)	
Revocation of a General Permit Covering)	
Landspreading of Industrial Waste and Approval)	
of Plans and Specifications for Construction of a)	Case No. IH-95-13
Waste Storage Structure by Mondovi Foods)	
Corporation, Inc., Town of Naples, Buffalo County,)	
Wisconsin)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice hearing was held at Alma, Wisconsin on October 30 and 31, 1995, Jeffrey D. Boldt, Administrative Law Judge (the ALJ) presiding. The parties agreed to the submission of post-hearing letter briefs and the last submittal was received on November 15, 1995.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

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FINDINGS OF FACT

1. On January 4, 1991, the Department of Natural Resources (DNR or the Department) approved a general permit for proposed landspreading of industrial waste generated by Mondovi Foods Corporation, Inc (Mondovi Foods), on two parcels of land in the Town of Naples, Buffalo County, Wisconsin. Both parcels are owned by Mondovi Foods and are located as follows: an 80 acre tract in the N 1/2 of the NE 1/4, Section 15, Township 24 North, Range 10 West, Town of Naples, Buffalo County, a 20 acre tract located in the SE 1/4 of the SE 1/4, Section 10, Township 24 North, Range 10 West, also in the Town of Naples.

2. On May 26, 1995, the DNR also approved plans and specifications pursuant to secs. 144.04, Stats., for construction of a proposed waste storage facility to be operated by Mondovi Foods, associated with the above activities in the Town of Naples. The storage facility has been constructed at the N 1/2 of the NE 1/4 of Section 15, T27N, R10W, Township of Naples, Buffalo County.

3. By letter dated May 4, 1995, Lynda Truan (the petitioner), W198 County Road HH, Mondovi, Wisconsin, 54755, requested a contested case hearing for review of the Department's actions.

4. On May 26, 1995, Department Secretary George Meyer granted, in part, a request for a contested case hearing limited to the following issues raised by the petitioner:

- A Whether the proposed landspreading poses an unacceptable human health risk;
- B Whether the proposed landspreading presents an unacceptable risk to groundwater quality or the environment;
- C. Whether the design of the proposed storage facility as conditionally approved by the DNR is sufficient to allow operation in a manner that will protect human health and the environment.

5. Mondovi Foods manufactures liquid and dried flavor enhancers for pet foods from poultry byproducts. The facility generates waste product that consists of approximately eighty-five percent water. The remaining fifteen percent of waste product consists of a combination of grit and feed from the stomachs of poultry in the form of cellulose. The company operates five days a week and has a waste product of approximately 3,000 gallons per day. The waste product is currently land spread year round. When chicken byproducts come into the plant they are placed in a vat heated to 165 degrees F for several hours. This has the effect of killing many pathogens that would otherwise enter the waste stream.

Mondovi Foods has recently constructed a 7,680 gallon reception pit and a 389,000 gallon storage structure for 120 day storage of wastewater. Storage will allow Mondovi Foods to land spread only two or three times per year. The storage structure is located in the town of Naples in the N1/2 of the NE1/4 of Section 15 Township 24 North, Range 10 West on 80 acres of agricultural land owned by Mondovi Foods. The soils are loamy, fine sands known as Plainfield sands. The

storage structure is built of five inch thick concrete. The structure is approximately 157 feet by 88 feet. The structure has 2:1 inside size slopes on the north, south and west angles. The east side has an approximately 10:1 slope. The waste will be hauled via truck from the Mondovi plant to the remote Town of Naples site. The waste is transferred to a reception pit via a pump to the concrete waste storage lagoon. Landspreading will then be undertaken in accordance with an approved management plan and Department regulations. A representative wastewater grab sample shall be collected quarterly and will be analyzed for BOD₅, ph, total kjeldahl nitrogen, ammonia nitrogen, nitrate plus nitrite nitrogen, total phosphorus, potassium and chloride. The general WPDES permit requires that Mondovi Foods keep a daily log of the volume of waste landspread, the land area onto which it was spread and the application rate in gallons per acre. The total pounds of nitrogen applied per acre per year is limited to 165 pounds per acre per year minus any other nitrogen including fertilizers applied. The permit also limits the maximum daily volume of waste which may be spread and sets a limit for total chloride.

6. The storage structure is more than the required 500 feet from any inhabited dwelling. [NR 213.08(1)(a)(1)] The nearest dwelling is the petitioner's residence located approximately 2,500 feet from the proposed storage site. The DNR approved landspreading area is no closer than 1100 feet from the nearest residence. Under Department regulations, landspreading must be at least 500 feet from an inhabited dwelling unless the owner gives written consent, in which case landspreading may occur within 200 feet of an inhabited dwelling [NR 214.17 (2)(b), Wis. Admin. Code]

7. The storage facility is more than 250 feet from any private, potable well. The nearest private well is more than ten times beyond the regulatory minimum. The proposed storage facility is more than 1,000 feet from a proposed community well. [NR 213.08(1)(a)(1-2), Wis. Admin. Code] The nearest public well is believed to be located in Mondovi, some four miles away. (Ex. 60b) No landspreading will occur within these distances from community or private wells. [NR 214.17(2)(c), Wis. Admin. Code]

8. The storage facility is located more than 200 feet from any surface water. The nearest surface water is a tributary to the Buffalo River, substantially more than 200 feet from the storage facility

9. The floor of the storage facility is more than seven feet from bedrock. (Ex. 60b) This is more than the required five feet from either bedrock or groundwater. [NR 213.08(2)(c), Wis. Admin. Code]

10. The storage facility meets all design criteria as set forth in sec. NR 213.08, Wis. Admin. Code. The proposed landspreading meets all site criteria under NR 214.17(2)(a) through (h). (See Ex. 55) There was no competent testimony from any witness that either the storage facility or the landspreading plan violated any legal requirement.

11. The proposed landspreading does not pose an unacceptable risk to human health if undertaken in accordance with the plan approved by the DNR. All of the expert testimony including all department witnesses concurred that the landspreading plan met all applicable requirements and posed no greater risk than common cow manure landspreading.

The petitioners raised issues relating to the counts of bacteria in the wastewater at the storage facility and which will be landspread on the Mondovi Foods property. The petitioners attempted to demonstrate that there was substantially more bacteria in the wastewater than Mondovi Foods had publicly acknowledged. This may well have been the case. Certain test results obtained by both parties suggest that the environmental assessment did underestimate the standard plate count (SPC) of the wastewater in question. However, Mondovi Foods and the Department of Natural Resources presented expert testimony that the levels of bacteria identified by the petitioners did not constitute a serious human health risk or threat to the quality of the human environment. By way of comparison it must be noted that the presence of E coli coliform bacteria is substantially lower than that permitted to be landspread pursuant to federal regulations with respect to municipal sludge. While the federal municipal sludge standards are not controlling in the application of industrial sludge, it is reassuring to concerns about public health and threats to the human environment that all of the test results, including the sample stored for over a week in the petitioner's kitchen, are well under the permissible federal municipal sludge regulations.

With respect to the risk of bacteria generated by the wastewater, Ms. Kathryn Wurzel testified on behalf of Mondovi Foods that the bacteria levels in the wastewater did not constitute a threat to human health. Ms. Wurzel, an environmental toxicologist, testified that the primary pathogen of concern with respect to poultry byproducts is salmonella. The liquid pet food product and resulting wastewater have never been shown to test positive for salmonella. It should be noted that dried flavor enhancer waste products are not subject to storage or landspreading but are sent to the sanitary sewer system. (Ex. 52) No salmonella organisms have ever been detected in any Mondovi Foods waste products. Further, Wurzel testified that the risk of human health problems from contact with human skin of any landspread Mondovi Foods waste product would be less than typical manure landspreading if Mondovi Foods injected or disced its waste product into the soils.

12. The proposed landspreading does not constitute an unacceptable risk to groundwater quality or the environment. Mondovi Foods presented the testimony of Mr. David Trainor, a hydrogeologist who testified that any bacteria which percolated through the sandy soils would die due to lack of a nutrient food source. Mr. Trainor testified that he did not believe the bacteria would survive even if they were to reach groundwater. Trainor did not believe it to be likely that any bacteria would reach the groundwater, given that there was no propellant generating pressure to the groundwater through the sandy soils. Accordingly, the record does not support the need to require groundwater sampling as suggested by the petitioners.

The petitioners made an honest attempt to obtain a groundwater sample by means of using a sand point driven well sample. Both Mr. Trainor and DNR experts testified that they did not believe that the test results generated by the petitioner's sand point test would be valid. Furthermore, there is not specific proof of causation with respect to any prior landspreading on or near the Werlein property and the sample obtained just below the Werlein property. It is not at all clear on this record that landspreading has caused groundwater contamination at the Werlein property.

With respect to potential contamination to surface waters, the great weight of the evidence was that the storage facility and accompanying reduction in the frequency of landspreading will actually be of considerable benefit in protecting the surface waters of the State of Wisconsin. The proposed landspreading plan involves landspreading twice a year in the spring and fall of the year. The proposed landspreading plan further contemplates the discing or injecting of landspread materials

into the soils to be better protected by soil cover. The biannual landspreading plans will reduce the likelihood of the direct runoff of landspread materials to tributary to the Buffalo River as described by Mr. Sache. The proposed biannual landspreading plan will better protect surface waters and is consistent with all applicable site approval criteria.

13. Numerous witnesses testified about their concerns that there were several cracks in the concrete of the newly built storage facility. Even the project engineer, Michael Tirg, testified that he was surprised to see as many cracks as are apparent in photographs of the structure. (See Ex. 32) However, a clear preponderance of the evidence demonstrates that the cracks did not compromise the structural integrity of the storage facility and are easily repairable. Further, the DNR has required "that all visible cracks be sealed on an annual basis" as part of its conditional approval of the storage structure. (See Ex. 26) Finally, Mondovi Foods presented testimony that existing cracks would be filled as soon as the structure was emptied.

A preponderance of the credible evidence indicates that the design of the storage facility meets legal requirements and allows operation in a manner that will protect human health and the environment.

14. The petitioners testified of a substantial and serious odor problem in connection with the storage structure and pit. The petitioners demonstrated that there is a significant concern about odor problems connected with the storage facility. Mondovi Foods has made a new odor abatement plan that involves the use of a crust presenting a barrier between the wastewater and the ambient air. The crust consists of hard material several inches thick and does mitigate odor concerns to some degree. The crust also serves to bar access to wastewater by mosquitoes and other pathogen vectors of that kind. Neighbors indicated that they were skeptical that a crust could be formed, but Mondovi Foods provided photos of the crusted-over lagoon. (See Exs. 81-82) The injecting or discharge of waste into the soil, whenever possible, as contemplated as part of the odor abatement plan should further reduce odor problems.

The waste storage facility should ultimately result in less odor in the ambient air on the whole. This would be of little consolation to the petitioners if the odors generated by the storage facility persist at a level beyond which even hardy dairy farmers are able to tolerate. Mondovi Foods has promised to be responsive to any odor complaints made by the petitioners. The petitioners need to regularly inform Mondovi Foods of any serious odor problems. If the odor problems are of such a magnitude that it interrupts the use and enjoyment of the Truan's property, the Department of Natural Resources and Mondovi Foods must consider other alternatives available to abate odors. Such options include introduction of chemical additives into the wastewater which may mitigate odor problems. If such additives are not successful in reducing odor problems connected with the storage facility, the Department must consider all other reasonable options to mitigate the odor problems experienced by Mondovi Foods' neighbors.

DISCUSSION

The petitioners impressed the ALJ as honest and hardworking dairy farmers who had legitimate concerns about their new neighbor Mondovi Foods and its storage facility in particular. The great weight of the evidence indicates that concerns about potential risks to human health are minimal in connection with the storage facility. The great weight of the evidence was that the storage

facility will actually improve the interaction of Mondovi Foods manufacturing process and the human environment. It must be noted that the Mondovi Foods Corporation undertook construction of the storage facility at the suggestion of the Department of Natural Resources. The Department experts felt that the biannual landspreading would be more protective of the surface waters of the State by reducing the risks of runoff. With respect to groundwater, the great weight of the evidence was that bacteria would not survive even in the unlikely event that small amounts were to leach out of the storage facility and enter into the sand above the groundwater. Further, the evidence indicated that the movement of groundwater was away from the petitioner's property. There was not any proof that prior landspreading actually contaminated any groundwater near the prior landspreading sites. The new landspreading sites are on Mondovi Foods' property and the company should make every effort to follow the Department of Natural Resources requirements in undertaking landspreading in a manner that reduces the possibility of injury to the human environment.

Tensions between Mondovi Foods and its neighbors were greatly damaged by apparently inadvertent errors found in newspaper advertisements, and which made their way into the environmental assessment prepared by the Department of Natural Resources. However, the great weight of high quality scientific evidence introduced at the hearing indicates that there are no significant human health risks connected with the storage facility and landspreading plan. Further, there are no significant risks to the human environment in connection with the storage facility and landspreading plans.

The bad blood between Mondovi Foods and the petitioners in particular and the legitimate suspicions raised by misleading public statements made by Mondovi Foods has created a bitter environment which must be reconciled. The area in which this failure to communication has operated most severely is in connection with odor problems at the site. The petitioners must let Mr. Constantine know when the odor becomes more than they can tolerate. Mondovi Foods has the right to operate its facility because it meets all applicable Department of Natural Resources regulations. The petitioners also have a right to enjoyment of their property without an overwhelming odor that penetrates their house and renders them and visitors nauseous. It is hoped that the new odor abatement plan will go a long way to mitigating this problem. If it does not, the Department of Natural Resources must consider other possible efforts to mitigate any problems connected with the storage facility including introduction of chemical additives and other methods to cover and control the odor associated with the waste storage facility.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested case hearings involving the Department of Natural Resources and issue necessary orders pursuant to sec. 227.43(1)(b), Stats.
2. The waste storage facility met the requirements of sec. 144.04, Stats., and NR 213, Wis. Admin. Code.
3. The proposed landspreading plan does not present an unacceptable risk to human health or to groundwater quality or the environment and meets all requirements of NR 214, Wis. Admin. Code.

4. The design of the proposed storage facility is sufficient to allow operation in a manner that protect human health and the environment. The facility exceeds all protective design criteria as required by NR 213, Wis. Admin. Code.

ORDER

THEREFORE IT IS HEREBY ORDERED that the Department of Natural Resources plans for landspreading and the WPDES general permit are AFFIRMED, IT IS FURTHER ORDERED, that the petition for review be DISMISSED, with prejudice.

Dated at Madison, Wisconsin on December 15, 1995.

STATE OF WISCONSIN
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By 
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.